Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BRYANT FLURY, PETITIONER

v.

DAIMLERCHRYSLER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a products liability case where the Eleventh Circuit Court of Appeals reversed the judgment of the District Court after jury trial (Southern District of Georgia, Brunswick Division) for abuse of discretion in failing to dismiss Plaintiff's case for alleged spoliation of evidence. The insurance company took possession of and removed the Plaintiff's wrecked vehicle before Defendant inspected the vehicle. The wreck occurred on November 9, 1996. The Plaintiff notified Defendant of the product defect (airbag) on November 22, 1996, and it was five weeks before the Defendant responded on January 3, 1997. The vehicle was moved from the storage yard before Defendant responded and although Plaintiff got the insurance company to leave the vehicle for approximately five months (April, 1997). (R11-149 at I-132), the insurance company without any notice to Plaintiff, ultimately removed the vehicle and destroyed it before this Plaintiff could secure the expert report or other information the Defendant requested in January, 1997. Defendant never made any further attempt to contact Plaintiff's attorney or inspect the vehicle after January 3, 1997.

(1) Where the issue is whether sanctions are appropriate should this issue be decided under Federal law rather than state law and if under Federal law:

(A) Should the Supreme Court set uniform criteria to follow so the various Courts will know what standards to apply;

(B) Should the lower Courts base their decision on whether to impose sanctions for spoliation of evidence on the power to sanction for discovery abuse, (Federal Rules of Civil Procedure 37 and 41(b)) as some appellate Courts do or on the rules of the Federal Rules of

Evidence (Federal Rules of Evidence Rule 403 and Rule 703) as some of the Courts do or should the discretion of whether or not to impose sanctions and what sanctions, if any, be based upon the inherent right of the District Court to control the progress of a case and if under the inherent power of the trial Court to control the case, or Federal Rules of Evidence or procedure (discovery abuse) should some uniform standards be established; or

(C) If the Circuit Courts of Appeal are to rely upon the "inherent power" of the District Court to exercise its discretion under the Federal Rules of Procedure or Federal Rules of Evidence when there are no uniform federal standards established or are they to use the standards established by the State law of the various states as the majority of the lower Courts appear to do now;

(D) If the District Court uses its discretion and after hearing from the parties and selects the sanction of charging the jury that they could draw a negative inference from the spoliation of the vehicle (which is the language requested by the Defendant) and there is evidence to support the discretion of the District Court, is the Court of Appeals authorized to substitute its discretion for the discretion of the District Court and make it mandatory that the complaint or defensive pleadings be dismissed if spoliation has occurred.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals appears at Appendix 1 to the petition and is reported at 427 F.3d 939 (18 Fla. L. Weekly Fed. C 1020).

The Order of the District Court appears at Appendix 2 to the petition.

The opinion of the Eleventh Circuit Court of Appeals denying Plaintiff's Motion for Rehearing and Motion for Rehearing En Banc appears at Appendix 3 to the petition. (Not published).

JURISDICTION

The date on which the United States Court of Appeals decided the case was October 5, 2005.

A timely Motion for Rehearing and Rehearing En Banc was filed by the Petitioner and was denied by the United States Court of Appeals for the Eleventh Circuit on December 1, 2005, and a copy of the Order denying rehearing appears at Appendix 1.

This Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals was filed with the Supreme Court within ninety (90) days as required by law.

RELEVANT PROVISIONS INVOLVED

The Courts have long recognized that evidence tending to show that a party destroyed evidence relevant to the dispute being litigated could be considered by the Court as a "spoliation inference". Jamie S. Gorelick, Steven Marzen and Lawerence Solum, *Destruction of Evidence*, §2.1 (1989), and such evidence permitted an

inference, the "spoliation inference", that the destroyed evidence would have been unfavorable to the position of the offending party *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F3d. 76.

STATEMENT

This case squarely raises important, recurring questions relating to spoliation, the law to be applied (State or Federal), the Standards to be applied, the sanctions to be applied, if any, and the factors justifying applications of sanctions.

The circuits are split on whether to apply Federal law or State law in diversity cases regarding spoliation, and without criteria in the Federal law the circuit courts apply a mix mash of law depending on the state where the case originated.

Without guidance from this Court the circuit courts are left to guess whether to apply Federal law or State law in judging spoliation cases and the circuit courts of appeals are split with the majority of the circuit courts holding that spoliation issues should be decided by Federal law rather than State law.

If the issues of spoliation are to be decided under Federal law rather than state law then are the Circuit Courts of Appeal to decide as issues of evidence or as discovery abuses or under a body of Federal Common law.

We respectfully submit that there is great confusion and diversity as to the justice the parties can receive based upon which circuit they are fortunate or unfortuate enough to land in for trial.

Plaintiff filed the present Complaint for damages seeking damages for enhanced injuries which Plaintiff contended occurred because the airbag on his new

Dodge pick-up was defective and failed to deploy. The Defendant contended that sanctions should be imposed on Plaintiff for spoliation of evidence because the insurance company had picked up the damaged vehicle and it was no longer available for inspection. (R13-140 at 4-6) The District Court denied Defendant's pre-trial Motion for Summary Judgment. (R4-57). Upon the trial the District Court charged the jury they could draw the inference that the evidence would have been harmful if Plaintiff was guilty of spoliation. (R16-151 at III-61) the jury found in favor of the Plaintiff and awarded $250,000.00 for the enhanced injuries. (R16-151 at III-79).

On appeal the three judge panel of the Eleventh Circuit Court of Appeals (by Fay, Senior Judge) reversed the District Court and held that the District Court abused its discretion by failing to dismiss Plaintiff's Complaint because of spoliation. The Plaintiff's Motion for Rehearing and for Rehearing En Banc was denied on December 1, 2005. Plaintiff files this Petition within ninety (90) days as provided by law.

The Eleventh Circuit Court of Appeals applied the wrong standards to determine the issue of spoliation and the issue of sanctions, if any. This Court has not established any criteria for the Federal Courts to follow in determining whether a party is guilty of spoliation of evidence and if so the criteria to be followed in determining what sanctions, if any, to impose. Some of the circuit Courts of Appeal treat spoliation as a discovery abuse, under F.R.C.P. 37 & 41(b). Some of the circuit Courts of Appeal treat spoliation as an evidence matter under the Rules of Evidence under Rule 403 or 703, some of the circuit Courts of Appeal treat spoliation as governed by the inherent power of the District Court to control their

Court and some of the circuit Courts of Appeal treat spoliation under state law rather than as under Federal law. Although the case of *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. is often referred to as establishing the rule that Federal law applies in spoliation cases instead of state law, *Chambers v. NASCO, Inc., supra,* is not a spoliation case.

The circuits are split with at least three of the circuits applying state law to decide the issue of spoliation and sanctions while the majority attempt to apply various federal standards or adopt state standards as the federal standards.

This case squarely presents the issue as to whether state law or federal law should be applied to determine the issue of whether a party has been guilty of spoliation and what sanctions, if any, are appropriate. Since this Court has not established the procedure or criteria to be applied in determining spoliation and sanctions, if any, under the federal law, what standards would be applied. Most of the circuits end up using the standards and criteria from the states which means that the circuit Courts of Appeal are applying different standards as they vary from state to state. Even in this case, the Eleventh Circuit used some of the criteria recognized in Georgia (which they misapplied) when there were no federal standards established and the Eleventh Circuit after substituting their discretion for the discretion of the District Court ruled as a matter of law that dismissal was mandatory.

In passing on this case the Eleventh Circuit held:

> This is a diversity suit, therefore, we must determine as a threshold matter whether to apply state or federal law. See *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8

(1965). Courts are split as to the question of whether state or federal law governs the imposition of sanctions for spoliation of evidence in a diversity suit. The majority of circuits have found that federal law applies. See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004) (imposition of sanctions for spoliation is an inherent power of federal courts and the decision to impose them is governed by federal law); see also *King v. Illinois Central Railroad*, 337 F.3d 550, 556 (5th Cir. 2003) (federal courts generally apply their own evidentiary rules in diversity matters, therefore, federal law governs whether a district court abused its discretion in declining to apply spoliation sanctions). Other jurisdictions apply state law. See *Nationwide Mutual Fire Insurance Company v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Cir. 1999).

We agree with the first view, that federal law governs the imposition of spoliation sanctions. Furthermore, in accordance with the fourth and fifth circuits, we conclude that federal law applies because spoliation sanctions constitute an evidentiary matter. See *Cole v. Keller Industries Incorporated*, 132 F.3d 1044, 1046 (4th Cir. 1998); see also *King* 337 F.3d at 556 (5th Cir. 2003). This view is consistent with the law of our circuit regarding the rules of evidence, where we have held that, "in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820 (5th Cir. Miss.1979). Thus, we conclude that federal law governs the imposition